

No. 09-2359

In the
United States Court of Appeals
for the Fourth Circuit

OLIVA RUX, et al.
Plaintiffs-Appellants,
v.

REPUBLIC OF THE SUDAN,
Defendant-Appellee,
v.

UNITED STATES OF AMERICA,
Intervenor-Appellee/Amicus Curiae.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS
INTERVENOR-APPELLEE AND AMICUS CURIAE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The United States files this brief as intervenor-appellee and amicus curiae in response to this Court's order directing the parties to address "whether any or all of the issues pending before this Court are rendered moot by the appellants' filing of a new, related action pursuant to 28 U.S.C. 1605A in *Avinesh Kumar, et al. v. The Republic of*

Sudan (No. 2:10cv171) in the Eastern District of Virginia.” Order, No. 09-2359 (Nov. 3, 2010). The United States reiterates its strong condemnation of the bombing of the U.S.S. Cole, an act of terrorism that murdered 17 United States service members, injured many others, and caused unimaginable suffering for the sailors’ families. The government remains committed to combating terrorism, and it supports appropriate efforts to seek redress from those who perpetrate or support terrorist acts. But as we explain below, because this appeal has become moot, it is no longer a proper vehicle through which plaintiffs may seek redress of their claims. Accordingly, the Court should dismiss this appeal for lack of jurisdiction.

Plaintiffs’ appeal raises two issues: (1) whether Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, violates plaintiffs’ equal protection rights because it discriminates against plaintiffs by preventing them from filing suit against Sudan under the new right of action created by 28 U.S.C. § 1605A(c); and (2) whether the district court properly dismissed plaintiffs’ claims against Sudan under Virginia common law because those claims are preempted by the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301–30308. The United States intervened as appellee under 28 U.S.C. § 2403

to defend the constitutionality of Section 1083(c), and it participated as amicus curiae to address DOHSA's preemption of plaintiffs' common law claims.¹

In their supplemental brief, plaintiffs fail to explain why their constitutional challenge to Section 1083 remains a live controversy. It does not.

Plaintiffs' constitutional claim is premised on the contention that Section 1083(c) is discriminatory because it prevents them from asserting claims under Section 1605A(c). However, plaintiffs have done just that — asserted claims under Section 1605A(c) in their new suit against Sudan. And they argue in a brief filed in that new suit that they do not rely at all on Section 1083(c) to bring suit and can assert their claims directly under Section 1605A(c). Because plaintiffs now have disavowed reliance on Section 1083, their challenge to the constitutionality of that provision is no longer a live controversy but is, instead, an abstract legal question. Accordingly, plaintiffs' challenge to Section 1083 is moot.

As for plaintiffs' challenge to the district court's dismissal of their common law claims, plaintiffs' argue that this appeal is moot if and only if Section 1605A(c) preempts their Virginia common law claims. Plaintiffs argue at length that Section

¹ As explained at oral argument, the United States has a significant interest in DOHSA's preemption of state law because the United States can be a defendant in suits brought under the Suits in Admiralty Act in which DOHSA claims are asserted. See 46 U.S.C. § 30903; *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991).

1605A(c) *does* preempt their common law claims. Thus, they conclude, their appeal from the district court's dismissal of those claims is moot. But this argument confuses ordinary preemption, which is a merits question, with mootness, which is jurisdictional issue. If Section 1605A(c) preempts plaintiffs' common law claims – an issue that need not be resolved in this appeal – that is an alternative basis for affirming the district court's judgment dismissing those claims. It is not a basis for dismissing this appeal as moot. However, because plaintiffs have argued at length that they may not properly maintain their common law claims (because they are preempted by Section 1605A(c)), this Court should determine that plaintiffs have abandoned those claims. In that event, there remain no live claims in this appeal and the entire appeal should be dismissed as moot.

Alternatively, if this Court concludes that plaintiffs have not abandoned their Virginia common law claims, plaintiffs' appeal would continue to present a live controversy only insofar as plaintiffs seek reversal of the district court's determination that DOHSA preempts their common law claims. In that event, the Court should dismiss plaintiffs' challenge to the constitutionality of Section 1083(c) as moot and resolve plaintiffs' appeal from the dismissal of their state common law claims on the merits by affirming the district court's judgment.

Finally, vacatur of the district court's judgment would not be appropriate in the context of this suit.

I. PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO SECTION 1083(C) IS MOOT.

A. Plaintiffs brought the suit that is the subject of this appeal under the so-called terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7). While this suit was pending, Congress repealed the then-existing terrorism exception and enacted a replacement. *See* NDAA, § 1083(a)(1) (codified at 28 U.S.C. § 1605A); *id.* § 1083(b)(1)(A)(iii) (striking 28 U.S.C. § 1605(a)(7)).² The new terrorism exception created for the first time a federal right of action against state sponsors of terrorism. *See* 28 U.S.C. § 1605A(c). Congress enacted transition rules to permit some plaintiffs who had filed suit under the prior terrorism exception to make use of the new right of action. NDAA Section 1083(c)(2) authorizes plaintiffs who had brought “prior actions” under the former terrorism exception to convert their action into one under the new right of action if certain conditions are met. Even if those conditions are not met, Congress additionally authorized plaintiffs to file “related actions” under the new right

² In this paragraph, we provide a short overview of Congress' 2008 amendment to the terrorism exception. A fuller description of the statutory scheme is unnecessary for this supplemental brief. However, a detailed explanation can be found in the United States' principal brief in this appeal. *See* U.S. Br. 3–8.

of action if their claims arise out of the same terrorist act that is the subject of a separate suit timely brought under the old terrorism exception.³ NDAA § 1083(c)(3).

While this case was in the district court, plaintiffs filed a motion for leave to supplement their complaint to add claims for non-pecuniary loss under the new federal right of action. J.A. 258. Plaintiffs relied entirely on NDAA Section 1083(c)(2) as the basis for their request. *Ibid.* In an order that is the subject of the current appeal, the district court denied plaintiffs' motion to amend. *Id.* at 272. Following the D.C. Circuit, the district court determined that plaintiffs could convert this pending suit into a suit under the new federal right of action only if they met the specified requirements for conversion contained in NDAA Section 1083(c)(2). J.A. 261–64 (discussing *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd on other grounds sub nom. Republic of Iraq v. Beatty*, 129 S. Ct. 2183 (2009)). But plaintiffs' suit does not satisfy all of those requirements, the district court held. J.A. 265–66.

In the district court (as on appeal) plaintiffs conceded that “literally applied,” Section 1083(c)(2)'s requirements require denial of their motion to supplement their complaint. J.A. 267 (quoting Pls.' Supp. Mem. in Supp. of Mot. for Leave to Supp. Fourth Am. Compl. (Pls.' Supp. Mem.) 3). However, plaintiffs argued that this

³ We have reproduced relevant portions of Sections 1083(c)(2) and 1083(c)(3) in the addendum to this brief.

provision violates their equal protection rights “by precluding them from seeking relief pursuant to § 1605A” (J.A. 270 (quotation marks omitted)), and because Section 1083(c)(2)’s requirements for conversion “are arbitrary and serve[] no legitimate state purpose” (J.A. 267 (discussing Pls.’ Supp. Mem. at 5)). Applying rational basis review, the district court rejected these arguments, principally because it determined that Section 1083(c)(2) did *not* prevent plaintiffs from seeking relief under the new right of action. Even if plaintiffs could not convert their suit under Section 1083(c)(2), they could have filed a new, related action under Section 1083(c)(3), relying on the new terrorism exception. J.A. 270. Thus, it was plaintiffs’ reliance on the wrong transition rule rather than the unconstitutionality of Section 1083(c)(2) that prevented plaintiffs from asserting claims under the new right of action.

B. On appeal, plaintiffs reiterated their arguments challenging Section 1083(c)(2) on equal protection grounds. Pls’ Br. 32–40. For the reasons given in the United States’ principal brief, those arguments necessarily fail on the merits because, among other reasons, plaintiffs do not contest that Section 1083(c)(2) did not prevent them from relying on the new right of action because they could have filed a related action under Section 1083(c)(3). U.S. Br. 18–25.

After the government’s brief was filed in this appeal, plaintiffs filed a new action against Sudan under 28 U.S.C. § 1605A(c), the new terrorism right of action. *Avinesh*

Kumar, et al. v. The Republic of Sudan, No. 2:10cv171 (E.D. Va.) (filed March 15, 2010).

In this new suit, plaintiffs do not rely on either Section 1083(c)(2) or Section 1083(c)(3), the NDAA's transition rules. In fact, plaintiffs expressly disclaim reliance on Section 1083(c)(2) as a basis for their suit: The district court asked plaintiffs to brief the constitutionality of Section 1083(c)'s waiver of the defense of *res judicata*. In addressing that issue, plaintiffs argued that the issue "is not an issue raised by the instant case" because, among other reasons, plaintiffs have asserted their claim directly under 28 U.S.C. § 1605A and did not seek "to have an earlier action deemed to be filed under 28 U.S.C. § 1605A, pursuant to NDAA § 1083(c)[(2)](A)." Pls.' Br. in Response to the Court's Order Dated August 3, 2010 (Pls.' D. Ct. Br. in Response), at 9, 10, No. 2:10cv171 (E.D. Va.) (Docket No. 21 Aug. 23, 2010).

By bringing a new suit under 28 U.S.C. § 1605A, plaintiffs have done the very thing they argue Section 1083(c)(2) prevented them from doing. And because they have disavowed reliance on Section 1083(c)(2), plaintiffs' challenge to the constitutionality of that provision is no longer a live controversy but is, instead, an abstract legal question. Accordingly, plaintiffs' challenge to Section 1083 is moot. See *Md. Highways Contractors Ass'n, Inc. v. Md.*, 933 F.2d 1246, 1249 (4th Cir. 1991) ("A case is moot when it has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law.")

(quotation marks omitted)). In their supplemental brief, plaintiffs nowhere explain why their constitutional challenge to Section 1083(c)(2) remains a live controversy, despite the fact that they have brought a new action which they claimed was precluded by that provision, and despite plaintiffs' express disclaimer of reliance on Section 1083(c)(2).⁴

If plaintiffs' new action were untimely, this appeal could possibly have continued to present a live controversy. However, the statute of limitations for the new terrorism right of action is "10 years after the date on which the cause of action arose." 28 U.S.C. § 1605A(b). The bombing of the U.S.S. Cole occurred on October 12, 2000. J.A. 254. Plaintiffs filed their new action on April 15, 2010. Complaint, No. 2:10cv171 (E.D. Va.) (Docket No. 1 Apr. 15, 2010). Thus, plaintiffs have argued in the district court that their new suit is timely. *See* Pls.' D. Ct. Br. in Response 11-12. Similarly, this appeal could possibly have remained live if plaintiffs' new suit is barred by res judicata principles. But res judicata prevents the assertion of claims "that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1971).

⁴ Plaintiffs assert that if this Court determines that 28 U.S.C. § 1605A(c) preempts their Virginia common law claims, then plaintiffs' separate constitutional challenge to Section 1083(c)(2) "will also be moot, as Appellants will have an unfettered right to pursue relief under 28 U.S.C. § 1605A" in their new action. Pls.' Supp'l Br. 6. However, plaintiffs make no argument to support this assertion.

Plaintiffs argue that their new suit is based on a statutory cause of action that did not exist, and so was not “previously available,” when plaintiffs initiated this current suit. *See* Pls.’ D. Ct. Br. in Response 5–6 . Thus, they contend, the prohibition against claim splitting that is embodied in the res judicata doctrine has no application in this context. *See id.* at 7. Plaintiffs themselves vigorously argue that their new action is in no way deficient; in the face of this argument, it would be inappropriate for this Court to conclude that, contrary to plaintiffs’ position, their new suit is actually vulnerable, and this appeal is therefore not moot. In any event, even if there is some reason to think that plaintiffs’ new action were untimely or might be barred by res judicata, plaintiffs’ constitutional challenge to Section 1083(c)(2) would nevertheless fail to remain live in light of plaintiffs’ decision to disclaim reliance on that provision.

Because plaintiffs no longer have a cognizable interest in this Court’s resolution of plaintiffs’ equal protection challenge to Section 1083(c)(2), the Court should dismiss that aspect of plaintiffs’ appeal as moot.

II. PLAINTIFFS’ APPEAL FROM THE DISTRICT COURT’S DISMISSAL OF THEIR COMMON LAW CLAIMS IS MOOT, OR THE DISTRICT COURT’S JUDGMENT SHOULD BE AFFIRMED.

A. Plaintiffs argue forcefully in their supplemental brief that their Virginia common law claims are moot because Section 1605A(c) preempts those claims, and thus plaintiffs can no longer recover damages on those claims. *See* Pls.’ Suppl. Br.

5–13. The government agrees that plaintiffs’ appeal from the district court’s dismissal of their state common law claims has become moot, but not because federal law has preempted them.

Mootness is a jurisdictional concept. “Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.” *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983) (citation omitted). When a case or controversy ceases to exist, the litigation becomes moot and the federal court no longer possesses jurisdiction to proceed. *Id.* at 70–71. Federal preemption of state law, by contrast, is not generally a jurisdictional matter. Instead, it is a merits issue addressing which substantive law — state or federal — provides the rule of decision in a suit.⁵ See, e.g., *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007) (“The

⁵ Preemption has a jurisdictional role in the removal context, where a suit in state court purportedly brought under state law can nevertheless be removed to federal court under the doctrine of “complete preemption” where federal law provides the exclusive right of action and so completely displaces any state law right of action. See, e.g., *Lontz v. Tharp*, 413 F.3d 435, 440–41 (4th Cir. 2005). But while complete preemption and ordinary preemption are “linguistically related, they are not as close kin jurisprudentially as their names suggest. Complete preemption is a jurisdictional doctrine, while ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim.” *Id.* at 440 (quotation marks omitted). The complete preemption doctrine is not relevant to this case, because plaintiffs brought

Supremacy Clause of the Constitution renders federal law ‘the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ As a result, federal statutes and regulations properly enacted and promulgated can nullify conflicting state or local actions.” (quoting U.S. Const. art. VI, cl. 2) (citations and some quotation marks omitted)).

If Section 1605A(c) preempts plaintiffs’ common law claims, as plaintiffs contend, that would be an alternative basis for affirming the district court’s judgment dismissing those claims on the merits. It would not be a basis for dismissing this appeal as moot. However, because plaintiffs have argued at length that they may not properly maintain their common law claims (because they are preempted by Section 1605A(c)), this Court should decide that plaintiffs have abandoned those claims. In that event, there remain no live claims in this appeal and the entire appeal should be dismissed as moot.

B. Alternatively, if this Court concludes that plaintiffs have not abandoned their Virginia common law claims, plaintiffs’ appeal would continue to present a live controversy only insofar as plaintiffs seek reversal of the district court’s determination that DOHSA preempts their common law claims. In that event, the Court should dismiss plaintiffs’ challenge to the constitutionality of Section 1083(c) as moot and

suit in federal court and removal thus is not an issue.

resolve plaintiffs' appeal from the dismissal of their state common law claims on the merits by affirming the district court's judgment. See *United States v. Singh*, 518 F.3d 236, 251 n.22 (4th Cir. 2008) (dismissing as moot constitutional challenge to forfeiture award, resolving remainder of appeal on the merits).

In resolving plaintiffs' challenge to the district courts' dismissal of the common-law claims, this Court need not and should not decide whether Section 1605A(c) preempts state common-law causes of action, as plaintiffs contend, or whether state common-law claims may be asserted under Section 1606 as "parallel [and] complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980) (discussing rights of action under the Federal Tort Claims Act and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). Because plaintiffs have argued at length that Section 1605A(c) preempts state common-law claims, this Court may assume that conclusion without deciding the issue and affirm the district court's judgment dismissing plaintiffs' common-law claims on that alternative ground.⁶ See, e.g., *Gagliano v. Reliance Standard Life Ins. Co.*, 547 F.3d 230, 235–36 (4th Cir. 2008) (assuming conclusion urged by party as basis for judgment against that party). Alternatively, the Court may affirm the district court's dismissal of plaintiffs' common law claims because

⁶ For this reason, the United States takes no position in this appeal on whether Section 1605A(c) preempts state common law claims.

those claims are preempted by DOHSA, as the district court held, and as we argued in our principal brief as intervenor-appellee. See J.A. 97–101; U.S. Br. 25–29.

III. VACATUR OF THE DISTRICT COURT’S JUDGMENT WOULD NOT BE APPROPRIATE IN THIS SUIT.

If this Court dismisses the appeal as moot, plaintiffs ask that the Court vacate the district court’s judgment. Pls.’ Supp’l Br. 15–17. However, vacatur of the district court’s judgment is not appropriate, even if the Court decides that this appeal in its entirety is moot.

Under Supreme Court precedent, vacatur of a district court judgment is not permitted where the party seeking appellate review has “caused the mootness by voluntary action” and has thereby “voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari.” *Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24, 25 (1994). Plaintiffs suggest that Congress mooted their appeal from the dismissal of their common law claims by enacting 28 U.S.C. § 1605A(c), thereby preempting state law rights of action. Pls.’ Supp’l Br. 15. That is not correct. Plaintiffs caused the mootness of their constitutional challenge by bringing a new action under Section 1605A(c) and by voluntarily abandoning reliance on Section 1083(c)(2) as a basis for bringing such a claim. And if plaintiffs’ challenge to the district court’s judgment is fully moot, that will be because this Court has concluded that plaintiffs

voluntarily abandoned their Virginia common law claims by arguing that those claims are preempted by Section 1605A(c). If this appeal is fully moot, its mootness derives solely from plaintiffs' voluntary decisions. Under *Bonner Mall*, vacatur is not appropriate in that circumstance.

When an appeal becomes moot, a principal purpose of vacating a district court judgment is to “clear[] the path for future relitigation of the issues between the parties.” *United States v. Munsingwear*, 340 U.S. 36, 40 (1950). A consequence of this Court's vacatur of the district court judgment would be that plaintiffs could seek to bring a new suit again challenging the constitutionality of Section 1083 or again asserting the very same state common law claims that are the subject of this appeal. See, e.g., *Alvarez v. Smith*, 130 S. Ct. 576, 583 (2009). The United States should not have to bear the risk of having to relitigate the constitutionality of Section 1083(c) against the same plaintiffs. Having chosen to abandon reliance on Section 1083 and their common law claims and so having voluntarily forfeited appellate review, plaintiffs are not entitled to vacatur of the district court's judgment.

Plaintiffs contend that vacatur is appropriate because, they argue, it will eliminate the “separation of powers” concerns the district court expressed about permitting plaintiffs to press their claims in their new suit. Pls.' Supp'l Br. 3; see *id.* at 15 n.1. However, it is unclear that vacatur of the judgment in this suit would have that effect.

The only record of the district court's concerns in plaintiffs' new action is the transcript of the hearing the district court held on August 24, 2010. In that hearing, the district court did not fully articulate the exact nature of its constitutional concerns. At one point, the district court seemed to suggest that it was concerned that in enacting the NDAA, Congress was directing an outcome in a particular case. Tr. of Hearing 19, *Kumar v. Sudan*, Civ. No. 2:10cv171 (Aug. 24, 2010) (filed in this appeal as Document 35-2); see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was."). In other places, the district court appeared concerned about whether Congress could authorize damages against a foreign state in the absence of a treaty. See, e.g., Tr. of Hearing 7-8, 10-11, 17, 37. Plaintiffs have given no reason to think that vacatur of the district court's judgment in this case would alleviate those concerns.

But just as importantly, the district court's expressed concerns were obviously tentative and interlocutory and are not currently before this Court. It would not be appropriate for the Court to vacate the judgment in this suit as an uncertain prophylactic measure intended to protect plaintiffs' interests in a separate suit. Should

the district court's final judgment in the new action be adverse to plaintiffs, plaintiffs will have an opportunity to seek review of that decision in this Court.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal as moot. Alternatively, the court should dismiss plaintiffs' constitutional challenge to Section 1083(c) as moot and affirm the district court's judgment dismissing plaintiffs' claims under Virginia common law.

Respectfully submitted,

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ADDENDUM

Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, provides in part:

(2) PRIOR ACTIONS. —

(A) IN GENERAL. — With respect to any action that —

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

* * *

(3) RELATED ACTIONS. — If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after —

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief uses proportionately spaced font and contains 3,887 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4, in 14 point Goudy Old Style.

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December 8, 2010

CERTIFICATE OF SERVICE

I certify that on December 8, 2010 the foregoing document, Supplemental Brief for the United States as Intervenor-Appellee and Amicus Curiae, was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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